

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-438

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(West Palm Beach, Florida)

RM-5894

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 1, 1988; Released: September 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of J. J. Taylor Companies, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6325 (1987), proposing the substitution of Channel 282C for Channel 282C1 at West Palm Beach, Florida, and the modification of petitioner's license for Station WEAT-FM to specify the higher powered channel. Supporting comments were filed by the petitioner and comments in opposition were filed by Guy Gannett Publishing Co. (Gannett), licensee of Station WSSP(FM), Channel 281C, Cocoa Beach, Florida. Reply comments were filed by the petitioner.

2. Gannett opposes the allotment if Channel 282C cannot be used at West Palm Beach in compliance with the Commission's minimum distance separation requirements. It calls attention to petitioner's statement that there is a large area where a Channel 282C transmitter can theoretically be located but that it would seek any waivers which may be necessary in order for Station WEAT-FM to operate at its present transmitter location if no such site were ultimately found to exist. It believes that such concern is warranted. Gannett states that the former licensee of Station WEAT-FM, operating on Channel 283, was unable to upgrade its facilities to minimum Class C due to the non-existence of transmitter sites which complied with both the Commission's minimum distance separation requirements and the Federal Aviation Administration's (FAA) tower height restrictions.¹ Gannett goes on to state that an airspace analysis of the transmitter site identified by the petitioner was recently conducted by John P. Allen (Allen), an Airspace Consultant. Allen believes that the FAA will find that the petitioner's proposed transmitter is a hazard to air navigation based upon substantial adverse effect to VFR en route navigation. In addition, Allen believes that there is no suitable site for a Channel 282C transmitter outside the existing towers southwest of Palm Beach or the existing Miami antenna farm near Hollywood. However, Gannett submits that use of the Miami antenna farm would not permit petitioner to provide West Palm Beach with the required 70 dBu city grade coverage and that use of Station WEAT-FM's present location would cause a short-spacing to Gannett's Station WSSP at

Cocoa Beach. It states that the Commission has repeatedly held that the existence of a suitable site is a prerequisite to the allotment of a broadcast channel, citing *Blackshear, Georgia*, 2 FCC Rcd 3323 (1987), *Sun Valley, Idaho*, 37 RR 2d 843 (1976), and *Pinckneyville, Illinois*, 41 RR 2d 69 (1977). Therefore, based on the above information, Gannett concludes that the grant of petitioner's request would constitute the allotment of a short-spaced channel, contrary to Commission policy, citing *Franklin, New Hampshire*, 49 RR 2d 703, 707 (1981), *Vass, North Carolina*, 45 RR 2d 1741 (1979), *Millington, Maryland*, 45 RR 2d 1689 (1979), and *Murphy, North Carolina*, 37 RR 2d 837 (1976).

3. Petitioner reiterates its intention to upgrade its facilities if Channel 282 is allotted to West Palm Beach as a Class C. Petitioner recognizes that the Commission has repeatedly held that a rule making proponent must demonstrate that there is an area within which an antenna meeting the Commission's technical requirements could be erected, citing *Portland, Tennessee*, 35 FCC 2d 601 (1972). However, petitioner contends that where it has been shown that there is a sizeable area within which a site could theoretically be located, the Commission has not required the proponent to demonstrate the actual availability of a particular site and has allotted the channel despite evidence that sites in the area may be difficult to locate. Rather, the Commission has held that consideration of actual availability is more properly dealt with as part of the application process, citing *Block Island, Rhode Island*, 2 FCC Rcd 6276 (1987) and *Pinckneyville, Illinois*, 47 FCC 2d 887, 890 (1974). However, where, unlike here, such theoretical compliance cannot be shown, petitioner notes that the Commission has refused to consider any mitigating "real world" circumstances, citing *Lake Geneva, Wisconsin*, 10 RR 2d 1755 (1967).

4. Petitioner asserts that the cases which Gannett cites concerning the allotment of a channel which would require a waiver of either the Commission's minimum distance separation or city-grade coverage requirements are not on point since its request is not predicated on the grant of such a waiver. Petitioner also states that Gannett does not cite, and it does not know of, any case in which the Commission has refused an allotment based solely on the unsupported opinion of an airspace consultant. To this end, petitioner submits a statement from another airspace consultant, James E. Shipman, who states that there is a potential transmitter site area extending 21 to 29 kilometers from West Palm Beach which should receive a favorable determination of no hazard from the FAA with an antenna height of 1049 feet AMSL.

5. We believe that the public interest would be served by allotting Channel 282C to West Palm Beach and modifying petitioner's license for Station WEAT-FM accordingly. After reviewing the pleadings before us, we find that Gannett has not shown that petitioner will be unable to locate a site which would comply with the Commission's minimum distance separation requirements and also meet FAA air hazard concerns, but rather only that it may be difficult to do so. Gannett's showing provides an in-depth analysis of potential air hazards at only one site. Petitioner's showing, on the other hand, considered a number of possible areas in which a tower complying with FAA requirements could be located. Here, petitioner has provided information attesting to its belief that an area extending from 21 to 29 kilometers from West Palm Beach can be utilized by Station WEAT-FM operating with Class C facilities. We note that the air space consultants retained

by Gannett and the petitioner disagree as to the availability of a site meeting FAA concerns. However, we believe that our past practice of deferring a determination as to the suitability of a transmitter site should be left to the application stage when an actual site proposal is before the Commission.² We also find that the problems which the former licensee of Station WEAT-FM encountered in attempting to upgrade its operation when it was licensed on Channel 283 are not relevant to the proposal now before us. There have been changes in the allotment table since Station WEAT-FM sought the upgrade in 1985 and the constraints on the placement of a transmitter for Channel 283 are different from those imposed for Channel 282. Channel 282C can be allotted to West Palm Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 26.5 kilometers (16.5 miles) southwest of the city.³

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 14, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
West Palm Beach, Florida	221A, 282, 300

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of J.J. Taylor Companies, Inc. for Station WEAT-FM, West Palm Beach, Florida, IS MODIFIED effective **November 14, 1988**, to specify operation on Channel 282C, in lieu of Channel 282C1, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

¹ The license of WEAT-FM was modified to specify operation on Channel 282C in lieu of Channel 283C by *Report and Order*, MM Docket 85-345, 51 FR 24151, July 2, 1986.

² Our action is not intended to prejudice the merits of any waiver which petitioner may seek at the application stage. If petitioner is unable to find a suitable site or obtain any requested waiver, we will entertain requests for appropriate additional action, if any, at that time.

³ The coordinates for this allotment are North Latitude 26-30-00 and West Longitude 80-10-00.